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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 873

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL., PETITIONERS

vs.

JOHN AGNEW, F. O. FAYERWEATHER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MARCH 19, 1946
CERTIORARI GRANTED APRIL 29, 1946

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1 In the United States Court of Appeals for the District of Columbia.

Civil Action No. 28726

JOHN AGNEW, F. O. FAYERWEATHER, CARE: DAVIES & DAVIES, ATTORNEYS, PATERSON NATIONAL BANK BUILDING, PATERSON, NEW JERSEY, PLAINTIFFS

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, WASHINGTON, D. C., DEFENDANT

Appeal From the District Court of the United States for the District of Columbia

Appendix to appellant's brief

2 In the District Court of the United States for the District of Columbia

Civil Action No. 28726

JOHN AGNEW, F. O. FAYERWEATHER, CARE: DAVIES & DAVIES, ATTORNEYS, PATERSON NATIONAL BANK BUILDING, PATERSON, NEW JERSEY, PLAINTIFFS

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, WASHINGTON, D. C., DEFENDANT

Complaint

Filed April 28, 1945

PETITION FOR WRIT OF CERTIORARI

The plaintiffs, John Agnew and F. O. Fayerweather, respectfully state that they are citizens of the United States and residents of the City of Paterson, State of New Jersey, and bring this action on their own behalf for the reasons hereinafter set forth:

1. The defendant, Board of Governors of the Federal Reserve System, is an administrative and quasi-judicial tribunal having its principal office in the City of Washington, District of Columbia, and is organized under and by virtue of the Act of December 23, 1913, Ch. 6, 38 Stat., p. 251, known as the "Federal Reserve Act," and certain acts amendatory thereof.

2. Plaintiffs represent that for a number of years past both plaintiffs have been duly elected, qualified and acting directors

of The Paterson National Bank of Paterson, New Jersey, the plaintiff, F. O. Fayerweather, having been a director of the said bank since January 13, 1925, and the plaintiff, John Agnew, having been a director of said bank since November 27, 1934. Both plaintiffs were reelected directors at each successive meeting of the shareholders after their original election, including the
3 shareholders meeting of January 11, 1944, and the shareholders meeting of January 9th, 1945. Following all such elections each took the director's oath prescribed by Section 5147 of the Revised Statutes of the United States as amended. They have performed their duties faithfully and according to law.

3. The Paterson National Bank is a national banking association and a member of the Federal Reserve System. Plaintiffs and their families are owners of a substantial amount of stock in said banking institution, holding approximately 1,000 shares out of a total of 12,000 shares outstanding.

4. On the 23rd day of March, 1945, the defendant, Board of Governors of the Federal Reserve System, removed the plaintiffs as such directors upon the claim of a violation of Section 32 of the Banking Act of 1933, as amended (U. S. C. Title 12, Sec. 78), a copy of said order of removal being hereunto annexed and marked Exhibit "A" and is prayed to be taken and read as a part hereof.

Said Section 32 of the Act of 1933 provides as follows:

"SEC. 32. Certain persons excluded from serving as officers, directors or employees of member banks.

No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, *primarily engaged* in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments. (June 16, 1933, c. 89, § 32, 48 Stat. 194; Aug. 23, 1935, c. 614, § 307, 49 Stat. 709.) [Italics ours.]

4 The claimed authority of the defendant to hear and decide the matter is contained in Section 30 of the aforesaid Banking Act of 1933 (U. S. C. Title 12, Sec. 77) which provides as follows:

"SEC. 77. Removal of director or officer.

Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national bank, or of a bank or trust com-

pany doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board of Governors of the Federal Reserve System may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank, affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System, in its discretion, may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: Provided, That such order and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than five years, or both, in the discretion of the court. (June 16, 1933, c. 89, § 30, 48 Stat. 193; Aug. 23, 1935, c. 614, § 203 (a), 49 Stat. 704.)

5. On June 29, 1944, the Comptroller of the Currency, pursuant to the provisions of the aforesaid Section 30, certified to the defendant that in his opinion plaintiffs had violated the provisions of the aforesaid Section 32 of the said Act and were continuing so to do after having been warned by him to discontinue such violations, in that, while serving as directors of the afore-

said bank during the years 1942, 1943 and 1944, they were during such time employees of an investment firm primarily engaged in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds or other similar securities. Thereupon on August 9, 1944, the defendant issued an order notifying plaintiffs to appear and show cause why they should not be removed from office as directors of said bank. The defendant Board did not itself hold such hearings, but instead appointed a "hearing officer", although no provision therefor was contained in the Act pursuant to which the Board claimed to act. Thereafter hearings were conducted by such "hearing officer" at the Federal Reserve Bank in New York during the months of October and December, 1944. Plaintiffs appeared at these hearings by counsel and protested upon the ground, among others, that under the language of
6 Sec. 30 of the Banking Act of 1933, as amended, the Board of Governors of the Federal Reserve System was the only body authorized by law to hold the hearings, and also filed certain other motions, set forth in the record, all of which were overruled by the Board.

6. Both plaintiffs were and are employees in the Paterson, New Jersey, office of Eastman Dillon & Co., a partnership, engaged in the brokerage and securities business and having its principal office in the City of New York, N. Y.

Eastman Dillon & Co., acts as broker or as principal in executing orders on the New York Stock Exchange, the Curb Exchange and the Philadelphia Exchange. It buys and sells securities either as broker or principal at wholesale or retail.

In the "underwriting field" (meaning the issue, flotation, underwriting, public sale or distribution at wholesale or retail or through syndicate participation of stocks, bonds or other similar securities) the market value of securities which were bought and sold by Eastman Dillon & Co., as agent and for its own account over an indefinite period amounted only to about 15% of the total market value.

In total number of transactions during an indefinite period prior to September 20, 1943, those in the "underwriting field" would amount to a similar percentage (15%) of the total number.

Eastman Dillon & Co., does business on a fiscal year basis ending the last day of February. For the fiscal year ending February 28, 1943, its gross income from the "underwriting field" amounted to 26% of its gross income from all sources, while its gross income from brokerage business (acting as agent in buying and selling for others) amounted to 42% of its gross income from all sources. For the fiscal year ending February 29, 1944,

its gross income from the "underwriting field" amounted to 32% of its income from all sources, while its gross income from its brokerage business amounted to 47% of its income from all sources.

7. All of the foregoing averments were found as facts by the defendant Board. Plaintiffs therefore aver that upon the
7 record made there was and is no valid basis for a charge that Eastman Dillon & Co., was "primarily engaged" in the underwriting of securities business or that plaintiffs have been guilty of the violation of Sec. 32 of the Banking Act.

8. Petitioners are advised by counsel and aver that the said opinion, findings of fact, conclusions of law and order are in disregard of the statutory provisions affecting the matter hereinbefore recited, are contrary to the express provisions of Sec. 32 of the Banking Act of 1933, as amended (U. S. C. Title 12, Sec. 78), are in excess of the jurisdiction of said Board and are in legal effect null and void. True copy of said opinion, findings of fact and conclusions of law, dated the 23rd day of March, 1945, is annexed hereto as Exhibit "B" and is prayed to be taken and read as a part hereof.

9. Petitioners aver that they were and are prejudiced by the said order of the said Board of Governors entered the 23rd day of March, 1945, wherein and whereby they were removed from their said offices as directors of the Paterson National Bank of Paterson, New Jersey, and deprived of the same and of the emoluments thereof, all without due process of law guaranteed them by the Fifth Amendment of the Constitution of the United States and that since they have no remedy by appeal or otherwise, they have a right to have said action of said Board of Governors reviewed by this Honorable Court.

Wherefore, The Premises Considered, the plaintiffs pray:

1. That a writ of certiorari may be awarded them directed to the Board of Governors of the Federal Reserve System commanding it to certify to this Honorable Court the complete record and proceedings in the matter hereinbefore recited to the end that this Court may review the same and consider and determine whether the said Board of Governors had jurisdiction and authority to make an issue the aforesaid order dated the 23rd day of March, 1945, and that upon such consideration of the record and proceedings and order, dated the 23rd day of March, 1945,
8 this Court may decree the same to be beyond the scope and power of the said Board of Governors and in excess of its jurisdiction, and null and void.

2. And for such other relief as to the Court may seem meet and proper.

JOHN AGNEW,
F. O. FAYERWEATHER,
Petitioners % Davies & Davies,
Paterson National Bank Bldg., Paterson, New Jersey.

HUGH H. OBEAR,
Attorney for Petitioners,
822 Southern Building, Washington, D. C.

DAVIES & DAVIES,
% Davies & Davies,
Paterson National Bank Building, Paterson, New Jersey.

DOUGLAS, OBEAR & CAMPBELL,
822 Southern Building, Washington, D. C.
Of Counsel.

[*Duly sworn to by John Agnew and F. O. Fayerweather; jurat omitted in printing.*]

9 *Exhibit A to complaint*

28726

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
WASHINGTON, DISTRICT OF COLUMBIA

IN THE MATTER OF JOHN AGNEW AND F. O. FAYERWEATHER, DIRECTORS, THE PATERSON NATIONAL BANK, PATERSON, NEW JERSEY

Order

Preston Delano, Comptroller of the Currency of the United States, being of the opinion that John Agnew and F. O. Fayerweather as directors of The Paterson National Bank, Paterson, New Jersey, have continued to violate section 32 of the Banking Act of 1933, as amended (U. S. C., title 12, sec. 78), a law relating to such natoinal banking association, after having been warned by the Comptroller of the Currency to discontinue such violations; and having, under date of June 29, 1944, certified the facts relating to such violations of law to the Board of Governors of the Federal Reserve System; and the Board having caused due notice to be served upon the said John Agnew and F. O. Fayerweather to appear and show cause why they should not be removed from office as directors of The Paterson National Bank, Paterson, New Jersey; and the said John Agnew and F. O. Fayerweather having appeared in person and by attorney; and the

Board having considered all of the motions filed in their behalf, all of the evidence, and all of the argument; and the Board having made its findings of fact and conclusions of law:

It is ordered by the Board that the motions heretofore filed in behalf of the said John Agnew and F. O. Fayerweather be and the same are hereby overruled.

It is further ordered by the Board that the said John Agnew and F. O. Fayerweather and each of them be and, when a copy of this order has been served upon each of them and upon the bank as hereinafter directed, each is thereby removed from office as a director of The Paterson National Bank, Paterson, New Jersey, and each thereupon shall cease to be a director of said bank.

It is further ordered and directed that the Secretary of this Board cause a copy of this order to be served upon the said John Agnew and upon F. O. Fayerweather and a copy of the same to be served upon The Paterson National Bank, Paterson, New Jersey.

By direction of the Board of Governors this 23rd day of March, A. D. 1945.

(S.) CHESTER MORRILL,
Secretary.

I, Chester Morill, Secretary of the Board of Governors of the Federal Reserve System, do hereby certify that the foregoing is a true and complete copy of an order of the Board of Governors of the Federal Reserve System, the original of which order is on file among the records of the Board of Governors of the Federal Reserve System.

In Witness Whereof, I have hereunto set my hand and caused the seal of the Board of Governors of the Federal Reserve System to be affixed at the City of Washington on the 23rd day of March, 1945.

[SEAL]

(S.) CHESTER MORRILL,
Secretary—Board of Governors.

Exhibit B to complaint

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
WASHINGTON

IN THE MATTER OF JOHN AGNEW AND F. O. FAYERWEATHER, DIRECTORS, THE PATERSON NATIONAL BANK, PATERSON, NEW JERSEY

Opinion

This is a proceeding under the applicable provisions of the Banking Act of 1933, as amended, hereinafter referred to as the Act) to determine whether John Agnew and F. O.

11 Fayerweather (hereinafter referred to as Respondents) or either of them should be removed from office as directors of The Paterson National Bank, (Hereinafter referred to as the Bank) Paterson, New Jersey. The authority of the Board of Governors of the Federal Reserve System to hear and decide
12 the matter is contained in section 30 of the Act,* which provides inter alia that, upon a certification by the Comptroller of the Currency that any officer or director of a national bank has continued to violate any law relating to such bank after having been warned by the Comptroller to discontinue such violations, the Board may cause notice to be served upon such officer or director to appear before it to show cause why he should not be removed from office. The section further provides that if the Board, after granting such officer or director a reasonable opportunity to be heard, finds that he has continued to violate such law after having been warned as aforesaid, the Board in its discretion may order that such director or officer be removed from office. In this matter, the Board received a certificate from the Comptroller of the Currency under date of June 29, 1944, reciting, that the Respondents had continued to violate section 32 of the Act after having been warned by him to discontinue such violations. Section 32 provides as follows:

"SEC. 32. No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or

*"SEC. 30. Whenever, in the opinion of the Comptroller of the Currency, any directors or officer of a national bank, or of a bank or trust company doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a state member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board of Governors of the Federal Reserve System may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System in its discretion may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: Provided, That such order and the findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than 5 years, or both, in the discretion of the court." (U. S. Code, title 12, sec. 77.)

other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited
13 classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments." (U. S. Code, title 12, sec. 78.)

The Comptroller's certificate further recited such additional facts as tended to show, if true, that Respondents while serving as directors of the Bank during the years 1942, 1943 and 1944 were during such time employees of an investment firm primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities.

Accordingly, the Board on August 9, 1944, issued an order notifying Respondents to appear and to show cause why they should not be removed from office as directors of the Bank. A Hearing Officer was appointed by the Board and thereafter hearings were conducted by such Officer at the Federal Reserve Bank of New York during October and December 1944. Respondents were represented in these hearings by counsel and were present at most of the hearings.

Thereafter, on February 15, 1945, the Hearing Officer certified to this Board the transcript of the proceedings conducted before him, together with his recommended findings of fact. He also forwarded certain suggested corrections to the record, exceptions to his tentative findings and certain motions, and a brief, all filed with him on behalf of Respondents.

On March 12, 1945, the Respondents, with their counsel, appeared in person before the Board in Washington, D. C., and their counsel argued the matter orally before the Board.

The Board has considered all of the record, as well as the brief and oral arguments made on behalf of the Respondents. The motions filed on behalf of the Respondents will be dealt with in the conclusions of law.

Findings of Fact

There is no dispute as to the essential facts. Respondent
14 Fayerweather has been a director of the Bank since January 13, 1925, while Respondent Agnew has been a director of the Bank since November 27, 1934. The Bank itself is a national banking association and a member of the Federal Reserve System. Both Respondents were reelected directors at the annual meetings of the shareholders of the Bank held

on January 13, 1942, January 12, 1943, and January 11, 1944. Following these elections, they took the directors' oaths prescribed by section 5147 of the Revised Statutes as amended; and these oaths were duly filed in the office of the Comptroller of the Currency. Total holdings of stock of the Bank by the Respondents and by their families approximate only about 1,000 shares out of a total of 12,000 shares outstanding. Mr. Fayerweather has been in the securities business since 1920 and both he and Mr. Agnew have been employed by the firm of Eastman, Dillon & Co. since March 1941 and are employed at the office of the latter in Paterson, New Jersey.

Eastman, Dillon & Co., a partnership which has its main office in New York, N. Y., advertises and holds itself out to the public as being engaged in the business described in its advertisements as follows:

"Underwriters, Distributors, Dealers and Brokers in Industrial, Railroad, Public Utility and Municipal Securities"

In the 1943 edition of "Security Dealers of North America," published by Herbert D. Siebert & Co., New York, N. Y., the Firm's business is described as follows; and this is an accurate description of the general nature of its business:

"Underwriters, Participating Distributors & Dealers in Municipal & General Market Issues; Stock Brokers."

The Firm does practically everything in relation to the handling of securities (other than United States Government Securities), acting as an agent and acting as a principal, wholesale and retail, executing orders on the Stock Exchange, the Curb Exchange, and the Philadelphia Exchange. Those different activities vary in volume. The Firm endeavors to transact business the way its customers desire and to transact the type of business its customers desire. Sometimes its customers prefer to do business in stocks and sometimes in bonds. Sometimes they buy or sell in large lots and sometimes in small lots.

The Firm does business on a fiscal year basis. Its year ends on the last day of February. For the fiscal year ending February 28, 1943, its gross income from the "underwriting field" (meaning the issue, flotation, underwriting, public sale or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds or other similar securities) amounted to 26% of its gross income from all sources; and its gross income from the brokerage business (acting as agent in buying and selling for others) amounted to 42% of its gross income from all sources. For the fiscal year ending February 29, 1944, its gross income from the "underwriting field" amounted to 32% of its gross income from all sources; and its gross income from the brokerage business

amounted to 47% of its gross income from all sources. For the period March 1, 1944 to July 31, 1944, its gross income from the "underwriting field" amounted to 39% of its gross income from all sources; and its gross income from the brokerage business amounted to 40% of its gross income from all sources. However, the figures for the period March 1 to July 31 may not be a fair criterion for a year's business because the Firm's business varies from time to time and sometimes the months of March, April, May and June constitute the more active period of its business. During 1943, the proportion of its business represented by underwriting had been larger than during 1942, due to the decline in the amount of commissions from the brokerage business.

Considering the market value of the securities which were bought and sold by the Firm as agent as well as those bought and sold by it for its own account during an indefinite period prior to September 20, 1943, that part lying within "the underwriting field" would represent about 15% of the total market value. If one were to classify the total number of transactions during an indefinite period prior to September 20, 1943, it would be found that those in "the underwriting field" would amount to a similar percentage (15%) of the total number.

16 During the year 1943, the Firm ranked ninth among 94 leading investment bankers of the country with respect to its total participations in underwritings of bonds. Excluding municipal and railroad bonds, its participations in underwritings during 1943 amounted to $14,657,000. For a period during 1943 it ranked first among the underwriters. The Firm gets all the underwriting business that it can.

The Firm does no business with the Bank and has not done so since the Fall of 1941, when the Bank disposed of all of its bonds, other than United States Government bonds. The Firm does not deal in United States Government bonds. Since October 1941, Respondents have done no business with the Bank other than a strictly commission business with its customers.

During 1943 the fact of Respondents' dual association with the Bank and with Eastman, Dillon & Co. came to the attention of the Federal Reserve Bank of New York. Thereupon the matter was brought to the attention of the President of the Paterson National Bank. The attention of the latter was directed to the provisions of Section 32 of the Banking Act of 1933, as amended, Regulation R of the Board and the interpretations which had been placed upon the law and regulation by the Board in previous cases. He was further advised that in the opinion of the Federal Reserve Bank of New York Respondents could not lawfully continue as directors of the Bank while associated with Eastman, Dillon & Co.

There followed a lengthy correspondence on this subject until,

on May 18, 1944 (Respondents meanwhile having been reelected as directors of the Bank on January 11, 1944), the Comptroller of the Currency, by registered letter sent to each of the Respondents, advised them that in the opinion of the Comptroller of the Currency each was violating section 32 of the Act by serving as a director of the Bank while being at the same time an employee of Eastman, Dillon & Co.; and each was warned by the Comptroller to discontinue such violation of law. Notwithstanding this warning, Respondents continued to serve as directors of the Bank and also continued as employees of Eastman, Dillon & Co.

17 Conclusions of Law

There are two preliminary matters to be disposed of before turning to the principal issue involved in this proceeding. The first of these is a motion filed on behalf of the Respondents challenging the right of any person or persons to conduct the hearings and to receive evidence on behalf of the Board. Respondents contend that because the statute provides for a notice "to appear before such Board" all of the evidence must be taken in the Board's presence. It is sufficient to say that this hearing is before the Board and that it is well settled that the requirements of due process do not preclude practical administrative procedure, including the use of examiners or hearing officers to take the evidence to be considered by the authority making the determination. Morgan v. United States, 298 U. S. 468, 481; 304 U. S. 1, 21. The significant words of the statute in this connection are those which authorize the Board to act if, "after granting the accused director or officer a reasonable opportunity to be heard," it finds that he has continued to violate the law after warning. We emphasize again that we have considered the record as presented to the Board in its entirety and that our decision is predicated upon such consideration.

In this connection, the "Suggested Corrections to the Record" filed by the Respondents have been considered by the Board, and and the Record will be regarded as having been corrected accordingly. Also, the "Exceptions to Tentative Findings of Fact" have been considered, but it appears that both points raised therein were taken care of by the Hearing Officer in preparing his "Recommended Findings".

The second preliminary matter is a motion challenging the sufficiency of the certificate of the Comptroller of the Currency. We do not deem this a substantial objection. The certificate taken as a whole recites facts which, assuming their truth, state a violation of section 32 of the Banking Act of 1933 and a continuation thereof after a warning to discontinue as provided under section 30 of the Act.

These motions and the motion to dismiss addressed to the sufficiency of the evidence are all overruled.

18 The only substantial question, and the one upon which this matter turns, is whether Eastman, Dillon & Co., was, at the times stated in the certificate of the Comptroller of the Currency, "primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities" within the meaning of section 32 of the Act. The Respondents contend that the use of the word "primarily" limits the application of the statute to those cases in which the underwriting business of the securities firm is first in volume in comparison with any other business or businesses in which it engages. It is true that, under one of its definitions, the word has a quantitative meaning. This, however, is not the only accepted meaning. The word "primary" is frequently used in another sense. For instance, red is one of the "primary" colors but it is not the only primary color; Saturn is one of the "primary" planets but it is neither the only nor the largest one. Standard dictionaries cite as examples of the use of the word in the latter sense expressions such as "the primary causes of a war" and "a matter of primary importance". (Merriam-Webster International Dictionary and Webster's Collegiate Dictionary). The Board is mindful of the rules of statutory construction that, while all of the words of a statute should be considered as having meaning, where a word used in a statute is susceptible of several meanings, that meaning should be adopted which best accords with the intention of the legislature in enacting the statute. Also, a word used in a statute should not be construed to produce an absurd consequence if it is susceptible of another construction in accord with the legislative intent. Section 32 is one of several measures enacted in 1933 designed to divorce commercial banking from investment banking. To say that a securities firm ranking ninth among the leading investment bankers of the country with respect to its total participations in underwritings of bonds, and for a period ranking first, should be held to be beyond the scope of the statute is to say that Congress enacted a statute with the intention that it would apply to no one.

19 The construction for which the Respondents contend, which is based on one accepted definition of the word "primarily", would lead to that result. The other construction, which is based on another accepted definition of that word, would conform to the Congressional intention as established by the legislative history. Accordingly, the Board finds as a matter of law that Eastman, Dillon & Co., at the times stated, was "primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at whole-

sale or retail, or through syndicate participation, of stocks, bonds, or other similar securities".

Respondents also argued that since the Bank had no dealings with Eastman, Dillon & Co., the evil at which the law is aimed is not present in this case, and that therefore the Respondents are not prohibited from serving in their dual relationships. The argument ignores the words of the statute, which provides that "no partner or employee" of any firm primarily engaged in underwriting or distributing securities "shall serve at the same time as an officer, director or employee of any member bank". No mention is made of transactions—or the absence of transactions—between the firm and the Bank. As originally enacted, the statute authorized the Board to issue individual permits, but the statute was amended in 1935 so as to revoke this power, and the Board is now authorized to make exceptions only "by general regulations". The Board under this authorization has made only one exception in its regulations on this subject,* and that does not apply to the facts of the present case.

An order that the Respondents be removed from office as directors of The Paterson National Bank, Paterson, New Jersey, will issue.

By direction of the Board of Governors this 23rd day of March, A. D. 1945.

(S.) CHESTER MORRILL,
Secretary.

In the District Court of the United States
For the District of Columbia

[Title omitted.]

Motion for writ of certiorari

Filed April 28, 1945

Come now the plaintiffs, by and through their attorneys, and move the Court for a writ of certiorari directed to Board of

*The exception is in the following provision in section 2 of the Board's Regulation R, entitled "Relationship with Dealers in Securities under Section 32 of the Banking Act of 1933":

"Any officer, director, or employee of any corporation or unincorporated association, any partner or employee of any partnership, or any individual, not engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of any stocks, bonds, or other similar securities except bonds, notes, certificates of indebtedness, and Treasury bills of the United States, obligations fully guaranteed both as to principal and interest by the United States, debentures issued by Federal Intermediate Credit banks, bonds issued by Federal Land banks, and general obligations of Territories, dependencies and insular possessions of the United States, may be at the same time an officer, director, or employee of any member bank of the Federal Reserve System, except when otherwise prohibited."

Governors of the Federal Reserve System, commanding it to send up the complete record and proceedings in the matter of
21 John Agnew and F. O. Fayerweather, directors The Paterson National Bank, Paterson, New Jersey, to the end that upon consideration of the record and proceedings the order of said Board be held to be in excess of its jurisdiction and null and void.

HUGH H. OBEAR,
Attorney for Plaintiffs,
822 Southern Building, Washington, D. C.

DAVIES & DAVIES,
Paterson National Bank Building, Paterson, New Jersey,
DOUGLAS, OBEAR & CAMPBELL,
822 Southern Building, Washington, D. C.,
Of Counsel.

Served a Copy of the Within Above Motion Notice on within named defendant Board of Governors of Federal Reserve System by serving George B. Vest, General Counsel, personally 4-30-45 C. Michael Kearney, U. S. Marshal in and for the District of Columbia, by T. R. East, Deputy U. S. Marshal. ——. U. S. Marshal's Fee, $2.00.

In the District Court of the United States
For the District of Columbia

[Title omitted.]

22 *Motion to dismiss*

Filed May 4, 1945

Comes now the Board of Governors of the Federal Reserve System by its attorneys undersigned and moves this Honorable Court to dismiss the complaint herein on the following grounds:

1. This Court is without jurisdiction to entertain a suit against the Board of Governors of the Federal Reserve System, which is an instrumentality of the United States and which has not consented nor can it consent to be sued herein.

2. This Court is without jurisdiction to issue a writ of certiorari for the purpose outlined in the bill of complaint herein.

3. The complaint fails to state any claim upon which any relief can be granted.

EDWARD M. CURRAN,
United States Attorney for the District of Columbia,
Court House, Washington, D. C.,
GEORGE B. VEST,
J. LEONARD TOWNSEND,
Board of Governors of the Federal Reserve System,
Washington, D. C.,
Counsel for Defendant.

Service to the within motion acknowledged.

HUGH H. OBEAR,
822 Southern Building, Washington, D. C.,
Counsel for Plaintiffs.

* * * * *

23 In the District Court of the United States for the District of Columbia

[Title omitted.]

Amended complaint for writ of certiorari or, in alternative, for an injunction

Filed May 15, 1945

1. The defendant, Board of Governors of the Federal Reserve System, is an administrative and quasi-judicial tribunal, having its principal office in the City of Washington, District of Columbia, and is organized under and by virtue of the Act of December 23, 1913, Ch. 6, 38 Stat. p. 251, known as the "Federal Reserve Act," and certain acts amendatory thereof. The defendants, Marriner S. Eccles, Ronald Ransom, M. S. Szymczak, John K. McKee, Ernest G. Draper, and Rudolph M. Evans are members of the Board of Governors of the Federal Reserve System.

2–8. Plaintiffs adopt the allegations of paragraphs 2 to 8, inclusive, of the original complaint filed herein.

9. Plaintiffs aver that they were and are prejudiced by the said order of the said Board of Governors entered the 23rd day of March, 1945, wherein and whereby they were removed from their said offices as directors of the Paterson National Bank of Paterson, New Jersey, and deprived of the same and of the emoluments thereof, all without due process of law guaranteed them by the Fifth Amendment of the Constitution of the United States.

10. Plaintiffs aver that the actions of the defendant Board of Governors hereinabove referred to have been participated in
24 by the individual defendants as members of such Board of Governors, and that such actions on the part of the indi-

vidual defendants were wholly without right or authority in law and in excess of their power and authority as members of the defendant Board of Governors.

11. Plaintiffs are in doubt as to whether their remedy for the aforesaid grievances is by way of writ of certiorari to the defendant Board of Governors or by way of mandatory injunction against the said Board or the individual members thereof.

Wherefore, the Premises Considered, plaintiffs pray:

1. That a writ of certiorari may be awarded them directed to the Board of Governors of the Federal Reserve System commanding it to certify to this Honorable Court the complete record and proceedings in the matter hereinbefore recited to the end that this Court may review the same and consider and determine whether the said Board of Governors had jurisdiction and authority to make and issue the aforesaid order dated the 23rd day of March, 1945, and that upon such consideration of the record and proceedings and order, dated the 23rd day of March, 1945, this Court may decree the same to be beyond the scope and power of the said Board of Governors and in excess of its jurisdiction, and null and void.

2. That in the alternative, this Court may enter a mandatory injunction against the defendant Board of Governors and the individual defendants herein named, commanding said defendants and each of them to vacate and set aside their purported order entered on the 23rd day of March, 1945, and hereinabove referred to.

3. That plaintiffs may have such other, further and alternative relief as to the court may seem meet and proper.

HUGH H. OBEAR,
822 Southern Building, Washington, D. C.,
Attorney for Plaintiff.

DAVIES & DAVIES,
Paterson National Bank Building,
Paterson, New Jersey.

25 DOUGLAS, OBEAR & CAMPBELL,
822 Southern Building, Washington, D. C.,
Of Counsel.

In the District Court of the United States

For the District of Columbia

[Title omitted.]

Motion of the individual defendants to dismiss

Filed June 9, 1945

Come now the defendants, Marriner S. Eccles, Ronald Ransom, M. S. Szymczak, John K. McKee, Ernest G. Draper and Rudolph

M. Evans, by their attorneys undersigned and move this Honorable Court to dismiss the amended complaint herein on the following grounds:

1. The Court lacks jurisdiction over the subject matter of this suit because the suit is in effect one seeking to interfere with and control the Board of Governors of the Federal Reserve System, an agency of the United States, in the performance of its lawful duties under the laws of the United States; such suit, therefore, is a suit against the United States which is not and cannot be made a part hereto.

2. The amended complaint otherwise fails to state a claim upon which any relief can be granted.

EDWARD M. CURRAN,
United States Attorney for the District of Columbia,
Court House, Washington, D. C.,
26 GEORGE B. VEST,
J. LEONARD TOWNSEND,
Board of Governors of the Federal Reserve System,
Washington, D. C.
Counsel for Defendants.

Service of the within motion acknowledged.
HUGH H. OBEAR,
822 Southern Building, Washington, D. C.
Counsel for Plaintiffs.

In the District Court of the United States

For the District of Columbia

Civil Action No. 28726

JOHN AGNEW, F. O. FAYERWEATHER, PLAINTIFFS

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, WASHINGTON, D. C.; MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCZAK, JOHN K. MCKEE, ERNEST G. DRAPER, RUDOLPH M. EVANS, DEFENDANTS

Judgment

(Filed June 25, 1945)

The above-entitled matter came on to be heard by the Court upon the complaint, the amended complaint, and motions to dis-

miss filed by the defendant, Board of Governors of the Federal Reserve System, and the individual defendants, respectively. Upon consideration of the oral argument had upon said motions and the briefs filed herein by the parties, it is by the Court this 25th day of June, 1945,

27 Adjudged, Ordered and Decreed, That the complaint and the amended complaint be and the same are hereby dismissed.

MATTHEW F. MCGUIRE,
Justice.

Approved as to form.
HUGH H. OBEAR,
Counsel for Plaintiffs.

* * * * *

28 In United States Court of Appeals, District of Columbia

Before Honorable HENRY W. EDGERTON, WILBUR K. MILLER, and E. BARRETT PRETTYMAN, Associate Justices.

No. 9102, October Term, 1945

JOHN AGNEW ET AL., APPELLANTS

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL., APPELLEES

Minute entry

November 14, 1945

Argument commenced by Mr. Hugh H. Obear, attorney for appellants, continued by Mr. J. Leonard Townsend, attorney for appellees, and concluded by Mr. Hugh H. Obear.

29 In United States Court of Appeals, District of Columbia

No. 9102

JOHN AGNEW, F. O. FAYERWEATHER, APPELLANTS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Argued November 14, 1945. Decided February 13, 1946

Mr. Hugh H. Obear for appellants.

Mr. J. Leonard Townsend, Assistant General Attorney, Board of Governors of the Federal Reserve System, with whom Mr. Edward M. Curran, United States Attorney, was on the brief, for appellees.

Before EDGERTON, WILBUR K. MILLER and PRETTYMAN, JJ.

Opinion

PRETTYMAN, J.: Appellants sought from the District Court a writ of certiorari to the Board of Governors of the Federal Reserve System (to which we shall refer as the Board) or, in the alternative, a mandatory injunction, seeking review of an order of the Board which had removed them from office as directors of the Paterson National Bank of Paterson, New Jersey. The District Court dismissed the complaint.

The substantive controversy revolves around the meaning of the words "primarily engaged" in the following statute:

"No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments."[1]

30 The Board is empowered,[2] upon certification by the

[1] Act of June 16, 1933, c. 89, § 32, 48 Stat. 194 (as amended Aug. 23, 1935, c. 614, § 307, 49 Stat. 709), 12 U. S. C. A. § 78.

[2] By Section 30 of the Act (12 U. S. C. A. § 77).

Comptroller of the Currency, to remove from office a director of a member bank if it finds that he has continued to "violate any law" relating to the bank, after having been warned by the Comptroller. A director who participates in the management of a bank after having thus been ordered removed from office, is liable to a fine of not more than $5,000 or imprisonment for not more than five years, or both.

Appellants were directors of the Paterson National Bank, one since November 27, 1934, and the other since January 13, 1925. Since March, 1941, they have been employees of Eastman, Dillon & Co., a New York concern engaged in the securities business.

After certification by the Comptroller of the Currency and after hearing, the Board made the following findings of fact in respect to Eastman, Dillion & Co.:

The company advertises its business as "Underwriters, Distributors, Dealers and Brokers in Industrial, Railroad, Public Utility and Municipal Securities." For the fiscal year 1943, its gross income from the "underwriting field" (meaning the issue, flotation, underwriting, public sale or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds or other similar securities)[3] amounted to 26 per cent of its gross income from all sources; and its gross income from the brokerage business (acting as agent in buying and selling for others) amounted to 42 per cent of its gross income from all sources. For the fiscal year ending February 29, 1944, its gross income from the "underwriting field" amounted to 32 per cent of its gross income from all sources; and its gross income from the brokerage business amounted to 47 per cent of its gross income from all sources. Considering the market value of the securities which were bought and sold by the firm as agent as well as those bought and sold by it for its own account during an indefinite period prior to September 20, 1943, that part lying within the "underwriting field" would represent about 15 per cent of the total market value. If one were to classify the total number of transactions during an indefinite period prior to September 20, 1943, it would be found that those in the "underwriting field" would amount to a similar percentage (15 per cent) of the total number. During the year 1943, the firm ranked ninth among 94 leading investment bankers of the country with respect to its total participation in underwritings of bonds. Excluding municipal and railroad bonds, its participations in underwritings during 1943 amounted to $14,657,000. For a period during 1943 it ranked first among the underwriters.

Upon the basis of the foregoing findings of fact, the Board reached the following "Conclusions of Law":

[3] The Board thus used the term "underwriting" to mean the entire operation described in the statute. We shall so use it.

"The only substantial question, and the one upon which this matter turns, is whether Eastman, Dillon & Co. was, at the times stated in the certificate of the Comptroller of the Currency, 'primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities' within the meaning of section 32 of the Act. The Respondents contend that the use of the word 'primarily' limits the application of the statute to those cases in which the underwriting business of the securities firm is first in volume in comparison with any other business or businesses in which it engages. It is true that, under one of its definitions, the word has a quantitative meaning. This, however, is not the only accepted meaning. The word 'primary' is frequently used in another sense. For instance, red is one of the 'primary' colors but it is not the only primary color; Saturn is one of the 'primary' planets but it is neither the only nor the largest one. Standard dictionaries cite as examples of the use of the word in the latter sense expressions such as 'the primary causes of a war' and 'a matter of primary importance.' (Merriam-Webster International Dictionary and Webster's Collegiate Dictionary.) The Board is mindful of the rules of statutory construction that, while all of the words of a statute should be considered as having meaning, where a word used in a statute is susceptible of several meanings, that meaning should be adopted which best accords with the intention of the legislature in enacting the statute. Also, a word used in a statute should not be construed to produce an absurd consequence if it is susceptible of another construction in accord with the legislative intent. Section 32 is one of several measures enacted in 1933 designed to divorce commercial banking from investment banking. To say that a securities firm ranking ninth among the leading investment bankers of the country with respect to its total participations in underwritings of bonds, and for a period ranking first, should be held to be beyond the scope of the statute is to say that Congress enacted a statute with the intention that it would apply to no one. The construction for which the Respondents contend, which is based on one accepted definition of the word 'primarily,' would lead to that result. The other construction, which is based on another accepted definition of that word, would conform to the Congressional intention as established by the legislative history. Accordingly, the Board finds as a matter of law that Eastman, Dillon & Co., at the times stated, was 'primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities.'"

31

In general terms the questions presented are: Had the District

Court jurisdiction? If so, what power has the court? Should the Board's interpretation of the statute stand?

It is important that the first two questions be more precisely defined. Generalities as to judicial review serve to confuse rather than to clarify. Three features of the case at bar delimit its questions of jurisdiction and of power. First, the statute involved is a general prohibition directed to all persons whatsoever. It forbids the persons described from being directors of a member bank. The authority of the Board is statutory and extends as far as, but no further than, the acts prohibited by the statute itself. Second, the Board seeks to determine the meaning of the statute as a matter of law; it does not present as the determinative premise
32 of its order a finding of fact that Eastman, Dillon & Co. was primarily engaged in underwriting. It is quite clear and commendably candid about its action and its objective. The facts as to Eastman, Dillon & Co. are the material from which the ruling is fashioned, but the ruling itself is a statutory construction. Third, no statutory method of appeal exists and the persons involved must, in order to test their rights, either seek the process of injunction or submit to criminal prosecution. The order of the Board is a final order.

The question of jurisdiction, therefore, is: Where an administrative agency issues a final order affecting the rights of individuals, which order is based upon a construction of a statute of general application, upon which construction the authority of the agency depends, and where, there being no statutory appeal, the individuals involved have no means of testing their rights except by civil action for injunction or by subjecting themselves to criminal liability by disobeying the order, has a Federal District Court jurisdiction to examine the order of the agency in a civil action for injunction? We think that it has.

We are not at this point considering the range of issues open to review, but merely whether, under the circumstances stated, resort can be had to the court at all. It is the right to challenge, not the extent of the remedial power, which must first be considered. We think it unnecessary to analyze the long line of cases dealing with the subject. Concurring in the St. Joseph Stock Yards case,[4] Mr. Justice Brandeis remarked, "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied." The factors determinative of jurisdiction vel non were carefully analyzed by Mr. Justice Frankfurther in the Rochester Telephone case.[5] The Duquesne Ware-

[4] St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38, 84, 56 S. Ct. 720, 80 L. Ed. 1033 (1936).
[5] Rochester Tel. Corp. v. U. S., 307 U. S. 125, 59 S. Ct. 754, 83 L. Ed. 1147 (1939).

house cases in this court [6] and in the Second Circuit [7] contain elaborate references to the authorities. In his dissent in the latter case, Judge Frank commented:

"I note in passing that in this Circuit we have not believed that the Supreme Court has suggested that we submit to 'administrative absolutism,' and consequently we have not hesitated to protect the legal rights of citizens when administrative officers have acted in excess of their statutory powers."

We think it unnecessary to review the cases at length.

The pending dispute is obviously a controversy and a case. The order complained of is not an interim administrative step. The requirements of equity are met by the fact that "disregard of the Commission's adverse action entails threat of oppressive
33 penalties." [8] The challenged power of the Board arises only when a director of a bank continues to violate a "law," in this case a statute. The content of the "law" is a subject for judicial determination. When presented under circumstances such as those just outlined, equity power exists to consider it.

A more difficult problem is the scope of the power of the court having jurisdiction. This question, like the question of jurisdiction, must be stated in terms of the case at bar, and not as an abstract generality. Most important of the limiting circumstances in this respect is that the Board has rested its order upon a construction of the statute as a matter of law. It did not evade or becloud the issue by merely making a finding of fact that, considering all the facts and circumstances, Eastman, Dillon & Co. was primarily engaged in underwriting, thus, seeking the protection of the doctrine of substantial evidence. Its objective is not the treatment of this concern alone. It seeks, quite properly, to establish the meaning of the statute which gives it power. With frankness and candor, which we think admirable, it poses the precise question to which it seeks an answer. Its course was to conclude that, as a matter of law, the phrase "primarily engaged" encompasses activities which, while not first or principal, are nevertheless substantial and important; and it then found that within the meaning thus established, Eastman, Dillon & Co. was primarily engaged in underwriting.

The ultimate question before us is whether the interpretation of the statute by the Board, as the definition of a standard to be applied generally, is correct. That question is not one of fact. It is not even what one learned author calls "a particularized conclu-

[6] Railroad Retirement Board v. Duquesne Warehouse Co., —— U. S. App. D. C. ——, 149 F. 2d 507 (1945).

[7] Duquesne Warehouse Co. v. Railroad Retirement Board, 148 F. 2d 473 (C. C. A. 2d, 1945).

[8] Language of Mr. Justice Frankfurter in the Rochester Telephone case, supra, note 5.

sion."[9] i. e., the exercise of judgment with respect to particular facts in determining the application of the statute.[10] The question is a matter of law.[11] We need not, therefore, attempt to thread our way through the confused and conflicting phases of the subject of judicial review which have puzzled both courts and students. On matters of law, unmixed, reviewing courts are free to substitute their own judgment for that of the administrator, although great weight must be given the administrative judgment. Consideration of a few recent decisions of the Supreme Court are sufficient to establish this conclusion. Dobson v. Commissioner, 320 U. S. 489, 64 S. Ct. 239, 88 L. Ed. 248 (1943);[12] Security Mills Co. v.
34 Comm'r, 321 U. S. 281, 64 S. Ct. 596, 88 L. Ed. 725 (1944); Medo Corp. v. Labor Board, 321 U. S. 678, 681–682, n. 1, 64 S. Ct. 830, 88 L. Ed. 1007 (1944).[13] For an earlier statement see Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285, 295 et seq., 42 S. Ct. 477, 66 L. Ed. 943 (1922).

We conclude as to the scope of the power of the court that the construction of the statute, for violation of which the Board is authorized to remove from office directors of a bank, is essentially a judicial function, but that the construction given the statute by the Board is entitled to great weight and respect.

The Board, in contending that the interpretation of this statute is within its unreviewable authority, relies upon Adams v. Nagle, 303 U. S. 532, 58 S. Ct. 687, 82 L. Ed. 999 (1938), as controlling. We find little similarity between that case and the case at bar. The opinion in that case, by Mr. Justice Roberts, dealt with the power of the Comptroller of the Currency to determine the sufficiency of the assets of a closed national bank as a prerequisite to assessment against the stockholders. The Court found that it had been invariable administrative practice, apparently since 1864, for the Comptroller to make such determinations, that prompt liquidation of such banks was desirable, that it would be intoler-

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[9] Stern, Review of Findings of Administrators, Judges and Juries, 58 Harv. L. Rev. 70, 98.

[10] Board v. Hearst Publications, 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1944); South Chicago Co. v. Bassett, 309 U. S. 251, 60 S. Ct. 544, 84 L. Ed. 732 (1940); Parker v. Motor Boat Sales, 314 U. S. 244, 62 S. Ct. 221, 86 L. Ed. 184 (1941); Rochester Tel. Corp. v. U. S., supra note 5.

[11] "When the issue relates to the existence or nature of a general rule or standard which will be applicable to many cases, it is normally regarded as presenting a question of law." Stern, supra note 9, at 94.

[12] "It is contended that the applicable statutes and regulations properly interpreted forbid the method of calculation followed by the Tax Court. If this were true, the Tax Court's decision would not be 'in accordance with law' and the Court would be empowered to modify or reverse it. Whether it is true is a clear-cut question of law and is for decision by the courts." (Page 492.) "... when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand. In view of the division of functions between the Tax Court and reviewing courts it is of course the duty of the Tax Court to distinguish with clarity between what it finds as fact and what conclusion it reaches on the law. In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter." Id. at 502.

[13] See also Stern, supra note 9, at 97: "Such questions as to the test to be applied or the factors to be considered relevant or controlling are legal rather than factual. Though they must be determined initially by the lower court or administrative body, it is open to the reviewing court to set them aside whenever it disagrees with the decision below."

able if the Comptroller's decisions were open to attack collaterally, and that Congress had confided this function to the Comptroller. The Court held that the primary object of the statute was the protection of creditors, that reimbursement of the stockholders must await possible realization upon the assets, and that the remedy of the stockholder must await that event. None of these circumstances or considerations are in the present case.

We come now to consider the meaning of the statute. The facts in the case at bar are clear and clearly found. Thereby the alternative involved in the decision is made clear. Underwriting and brokerage, although both concerned with securities, are vastly different operations. By no quantitative test shown in this record can Eastman, Dillon & Co. be held to be principally or chiefly engaged in underwriting. Whether measured by volume, by income, or by number of transactions, its business is principally brokerage.[14] On the other hand, its underwriting business is substantial, and it ranks high in the relative dollar amount of such business among concerns in the United States. So, if substantial business other than the chief or principal business be considered, the company is within the statute. Thus, the question narrows to this: Does "primarily engaged" mean chiefly, or principally, engaged, or does it mean simply substantially, or importantly, engaged?

35 The Board says that the phrase "primarily engaged" has two possible meanings. Its premise is that the word "primary" has two possible meanings, one being a quantitative meaning and the other the meaning which the word has in expressions such as "the primary colors," "one of the primary planets," "the primary causes of war," and "a matter of primary importance." It says that the latter meaning accords with the legislative intent and, further, that the former leads to absurd results. It, therefore, adopts the latter meaning and concludes that, as a matter of law, Eastman, Dillon & Co. was primarily engaged in underwriting within the meaning of the statute.

It is true that the adjective "primary" has different shades of meaning, but always its basic idea is "first". It may refer to the first in order of time, and thus mean original or initial; or in order of importance, and thus mean chief or principal; or in order of derivation, and thus mean fundamental. Its synonyms are "prime" and "primeval". Its antonyms are "secondary" and "lesser". The difference which the Board senses, but does not state, is that "primary" is not restricted to the singular; it may refer to a plural. Thus, the primary colors are not one but several:

[14] These are all the quantitative measures mentioned or found by the Board, and the court is not permitted to speculate as to whether other measurements, such as net income, interest, effort or self-appraisal of importance, not found by the Board, might lead to a different result. We must assume that the Board mentioned all relevant factors, and certainly the validity of its conclusions must rest upon its findings and not upon speculations by the court as to other facts.

and so with the planets and the causes of war. An activity may be either a primary activity or the primary activity of a given person. The adverb "primarily" has similar shades of meaning. The Board's interpretation is, in effect, that "primarily engaged" as it occurs in this statute encompasses all the important activities of a concern; that it means "a" primary activity, not merely "the" primary activity.

But "primary" when applied to a single subject always means first, or chief, or principal. A concern's "primary activity" is never one of several; it is always the first, or chief, or principal, activity. And so it is with "primarily". When applied to a single activity, as it is to underwriting in the case at bar, it always means the first, or chief, or principal, activity. One would never say that a person is "primarily concerned" or "primarily interested" or "primarily engaged" in a specified single activity, if the idea sought to be conveyed was that the named activity was a lesser among several important activities. To say that such an expression conveys that idea is, we think, clearly erroneous.

In its brief, the Board epitomizes its position by saying, "Undoubtedly, then, Eastman, Dillion & Co. are 'fundamentally' or 'primarily' engaged in both the brokerage business and the underwriting business. To put it otherwise, underwriting is one of the businesses in which the firm is 'primarily' engaged." The latter sentence makes plain the error of law of the Board. It is true that the word "primary" may be applied to a plurality of items in order to distinguish that group from still others as secondary. But this does not answer the question which is posed by the statute. That problem is to ascertain whether the designated concern is primarily engaged in a single, named activity, i. e., underwriting. That problem is not solved by finding that the concern is primarily engaged in a group of several activities, in contradistinction to still other lesser activities, and then concluding that the concern is primarily engaged in each separate activity in the first group.

That process would lead to the conclusion that an activity
36 which, standing by itself, is by every standard less than another, is, nevertheless, primary. Such a conclusion is simply not true. The activity in which the concern is in fact secondarily engaged cannot be made its primary engagement by a process of reasoning which includes a fallacy of division.

The expression which Congress chose to use in this statute is an ordinary one, and in ordinary usage certainly refers to the chief or principal activity in which the company is engaged.[15] In deal-

[15] It is true, as the Board says in its brief, that some dictionaries give "fundamental" as a meaning of "primary"; and some also give "essential", which, however, the Board does not mention. But these words are not synonyms of "primary", and they overlap in meaning only when the implication of "fundamental" or "essential" is "first" or "principal". Other meanings of "fundamental" and "essential" cannot be ascribed to "primary" merely because the words are in part analogous. Certainly those words, in meanings other than "principal", are not apt as descriptive of business activity.

ing with practical matters, Congress does not consciously utilize obscure meanings of ordinary words to convey its intent. We should not impute to it either an ineptitude or a departure from its custom. So far as the ordinary and normal meaning of the words is concerned, the matter before us in clear and without difficulty. The sum of the matter is that we simply do not see how it can be said that a company is primarily engaged in underwriting, when underwriting is not, by any standard of measurement shown by the record, its chief or principal business. The Board strains at the language in order to achieve a result which it believes to be desirable.

It should be added that if Congress had meant to direct its prohibition to companies simply engaged in underwriting, or substantially engaged in underwriting i. e., to companies whose underwriting activities are secondary although important among several activities), it could have said so, as it has said many times in statutory enactments, and did in fact, as we shall see, so say in another section of this same Act.

But the Board says, quite properly, that legislative intent must govern statutory construction. It says that Congress intended to separate as far as possible national and member banks from securities dealers. In support, it points in its brief to the Senate Committee Report [16] on the bill which became the Act, and to Section 20 [17] and Section 21 [18] of the Act.

The section of the Committee Report upon which the Board relies reads:

"The committee has, therefore, determined to present proposed legislation aimed at the following objects:

"(1) To separate as far as possible national and member banks from affiliates of all kinds."

But the bill upon which the Committee was reporting contained a definition of "affiliates". When the Committee said "affiliates", it was using a term defined, not a generality. The bill, and the
37 consequent Act [19] defined an affiliate as any corporation,

[16] Sen. Rept. No. 77, 73rd Cong., 1st Sess. (1933).
[17] 48 Stat. 188, 12 U. S. C. A. § 377.
[18] 48 Stat. 189, 12 U. S. C. A. § 378.
[19] 48 Stat. 162, 12 U. S. C. A. § 221a. The Act said:
"As used in this chapter—
"
"(b) Except where otherwise specifically provided, the term 'affiliate' shall include any corporation, business trust, association, or other similar organization—
"(1) Of which a member bank, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 per centum of the number of shares voted for the election of its directors, trustees, or other persons exercising similar functions at the preceding election, or controls in any manner the election of a majority of its directors, trustees, or other persons exercising similar functions; or
"(2) Of which control is held (directly or indirectly, through stock ownership or in any other manner, by the shareholders of a member bank who own or control either a majority of the shares of such bank or more than 50 per centum of the number of shares voted for the election of directors of such bank at the preceding election, or by trustees for the benefit of the shareholders of any such bank; or
"(3) Of which a majority of its directors, trustees, or other persons exercising similar functions are directors of any one member bank."

etc., of which a member bank owns or controls either a majority of the voting shares or more than 50 per cent of the shares voted for the election of directors, or controls in any manner the election of a majority of directors; or of which control is held by shareholders of a member bank who own or control either a majority of the shares of the bank or more than 50 per cent of the shares voted for the election of directors of the bank; or of which a majority of its directors are directors of any one member bank. It is thus clear that the separation about which the Senate Committee was speaking in the Report relied on by the Board, was based upon a majority of shares or a majority of directors. It was not a complete dissolution of intermingled personnel; it was a dissolution of control only. It applied a quantitative test. Such were the "affiliates" to which the Senate Committee referred.

Moreover, the full text of the Committee Report does not bear out the meaning attached by the Board to the single sentence quoted. The context is:

"(a) The greatest of such dangers is seen in the growth of 'bank affiliates' which devote themselves in many cases to perilous underwriting operations, stock speculation, and maintaining a market for the banks' own stock often largely with the resources of the parent bank. This situation was never contemplated by the National Banking Act, and it would, therefore, appear that the affiliate system calls for the establishment of some legislative provisions designed to deal with the situation. It has been suggested from many quarters that the affiliate system be simply 'abolished.' This suggestion has much authority behind it, but, in addition to the manifest difficulty of enforcement, owing to the existence of well-known subterfuges to maintain control, there remains the question whether it would be of much real service so long as State legislation permits the growth of affiliates in connection with State banks and trust companies. The committee has, therefore, determined to present proposed legislation aimed at the following objects:

"(1) To separate as far as possible national and member banks from affiliates of all kinds.

38 "(2) To limit the amount of advances or loans which can be obtained by affiliates from the parent institutions with which they are connected.

"(3) To install a satisfactory examination of affiliates, working simultaneously with the present system of examination applicable to the parent banks." [20]

It is thus clear that the Committee, in this section of its Report, was concerned with the "bank affiliate" system, and, further, that it did not deem feasible the abolition of that system, dangerous

[20] *Supra*, note 16, at 10.

though it was said to be. That the legislation was not designed to accomplish the total abolition of even the affiliate system, and was addressed to a described evil, lends weight to the idea that in using the word "primarily" in its description of the prohibited relationship in Section 32 of the Act, Congress intended a restricted scope rather than totality in the prescribed separation.

Referring to Section 20 of the Act, the Board says, in its brief in this court:

"One of the principal sections designed to attain these purposes is section 20 of the Act, which provides that no member bank shall be affiliated 'in any manner' with any company 'engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities.'"

But the Act does not read as the Board quotes it. It does not say "that no member bank shall be affiliated 'in any manner' with any company," etc. It says, "no member bank shall be affiliated in any manner *described in subsection (b) of section 221a of this title* with any corporation," etc. [Italics supplied.] The subsection mentioned is the definition of affiliates which we have just discussed. Thus, Section 20, in full text, prescribes dissolution of control only, and not the complete divorcement indicated by the partial quotation relied on by the Board. There is a vast difference.

Thus, it is plain that the Committee Report and the section of the Act from which the Board says we must derive the intent of Congress, do not prescribe the complete divorcement which the Board urges, but, quite the contrary, direct only a dissolution of control. In each provision of the definition of the prohibited affiliation, the line is drawn at the majority. Forty-nine per cent is permissible. Fifty-one per cent is prohibited. This is a quantitative test. If, as the Board says, we are to ascertain the intent of Congress by these references, we reach the clear conclusion that Congress intended to apply a quantitative test in its prohibition.

As to Section 21 of the Act, the Board says, in its brief in this court:

"Section 21 is complementary to section 20 and, among other things, prohibits any company which is engaged in the underwriting business from engaging 'at the same time to any extent whatever in the business of receiving deposits . . .'"

This section of the Act, prohibiting dealers in securities from engaging in the banking business, contains two expressions
39 pertinent to the present inquiry. Congress here used the phrase "engaged in the business"—not "primarily engaged," or "principally engaged," but simply "engaged". It added the emphatic phrase "to any extent whatever". These words prescribe

complete separation. When Congress meant complete separation, it said so, in this same Act, in unmistakable terms. It knew what terms to use, and used them.

We do not know why Congress, in separating member banks from outside interests, went only so far as to prohibit control. We do not know why it rested its prohibition upon the precise line of majority. We only know that it did so. And the fact that it did so seems to indicate that when it used the term "primarily engaged" in Section 32 of the Act, as contrasted with "engaged" and "engaged to any extent whatever" in Section 9, it had in mind a chief or principal business as measured by a quantitative test.

The Board says that if "primarily engaged" be construed to mean chiefly or principally engaged, absurd consequences would follow.[21] But we do not see that the consequences would be more absurd than those which ensue when Section 20 is applied. That a principality of business be requisite to a prohibition is no more absurd than that 51 per cent of stock ownership be requisite. The Board urges that to except one of the large and important concerns from this prohibition would be absurd. If the interrelationship were 49 per cent, it would be excepted from the prohibition of Section 20. One seems no more absurd than the other.

Research by the court has revealed one, and only one, previous reference by the Board to the provision here involved.[22] Our idea that the connection is too remote to be helpful seems to have been shared by the Board as that ruling was neither cited nor mentioned by it in brief or argument. On the other hand, the same phrase in other statutes has been repeatedly interpreted. For example, by Section 2 (a) (8) of the Public Utility Holding Company Act of 1935,[23] the Securities and Exchange Commission was authorized to declare a company without the Act if it found certain facts, including one that the company "is primarily engaged in one or more businesses other than the business of an electric utility company," and, in another clause, if it "is engaged primarily in manufacturing"; similar phrases appear in Section 3 (a) (3)[24] in relation to holding companies. The Commission has many times considered cases under the quoted language, and while we do not find that it ever defined the phrase, the findings of fact underlying its conclusions appear always to have been quantitative in nature and it uses the terms "principal business" and "principally engaged" as synonymous with "primarily engaged" (for example, The Cleveland-Cliffs Iron Company, 3 S. E. C. 326, 329, 330; Sloss-Sheffield Steel and Iron Company, 3 S. E. C. 460; Aluminum Com-

[21] The Board remarks in its conclusions that if "primarily" be held to mean principally, the statute would apply to no one. So far as appears, this observation is a speculative generality, which on the record cannot be treated as a finding of fact.
[22] 27 Fed. Reserve Bull. 399 (1941).
[23] 49 Stat. 804, 15 U. S. C. A. § 79b.
[24] 49 Stat. 810, 15 U. S. C. A. § 79c.

pany of America et al., 5 S. E. C. 640, 645; Fairbanks Morse & Co., 8 S. E. C. 360, 361). In the International Paper Company case, 9 S. E. C. 937, 940, the Commission said:

"After having given consideration to the circumstances surrounding the sales of electric energy by applicant, particularly that the energy sold is generated by owner or leased facilities devoted primarily to applicant's own use, as well as to the quantum and relative percentage of such sales, it appears to the Commission that International Paper Company is primarily engaged in one or more businesses other than the business of an electric utility company within the meaning of the Public Utility Holding Company Act of 1935, * * *"

The full phrase in the Public Utility Holding Company Act relating to holding companies is "only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public-utility company." The Commission held in the Cities Service Company case, 8 S. E. C. 318, 329, that the entire phrase must be read together and that while the scope of the qualification is explained by the latter portion of the language, the "'incidentally' phrase" must also be given effect.

"Primarily engaged" also appears in the Bankruptcy Act,[25] an exemption being granted a person "primarily bona fide personally engaged" in farming. The courts have had many cases involving this definition and uniformly recite quantitative tests.[26] They have used such expressions as "'Primarily' means basically, or in such manner as to be of first importance or of principal concern";[27] "The evidence does not support the conclusion that he was engaged chiefly in farming or tillage of the soil";[28] and "His farming activities did not, we think, ever become his primary business."[29]

It is of some importance, in referring to the Public Utility Holding Company Act and the Bankruptcy Act as throwing some light upon the terminology of the Banking Act, that the three Acts were before Congress at the same time. The first was approved August 26, 1935,[30] a reenactment of the second on May 15, 1935,[31] and the third on August 23, 1935.[32]

Further in respect to the Board's statement that "primarily" should not be construed to produce an absurd consequence (with

[25] 47 Stat. 1470, 11 U. S. C. A. § 203 (r).
[26] Williams v. Great Southern Life Ins. Co., 124 F. 2d 38 (C. C. A. 5th, 1941); Benitez v. Bank of Nova Scotia, 125 F. 2d 523 (C. C. A. 1st, 1942); Swift v. Mobley, 28 F. 2d 610 (C. C. A. 5th, 1928); Skinner v. Dingwell, 134 F. 2d 392 (C. C. A. 8th, 1943).
[27] Benitez v. Bank of Nova Scotia, supra note 26, at 531.
[28] Swift v. Mobley, supra note 26.
[29] Skinner v. Dingwell, supra note 26, at 393.
[30] 49 Stat. 804.
[31] 49 Stat. 246.
[32] 49 Stat. 704.

which statement we, of course, agree), in the light of the Senate Committee Report on the Banking Act, which we have discussed, we see a possible reason why Congress went only so far as to prohibit interrelationship between a bank and a security concern when the business of the latter is chiefly or principally underwriting. The evil at which this section of the statute was aimed was the possible selling of securities to the bank by its directors. Congress may well have considered that such practice is much more
41 likely to occur where underwriting is the principal or chief business of a concern, than where underwriting is a lesser or secondary interest. So it is not wholly unreasonable, in our view, that Congress laid the prohibition at that line.

At the same time, it may be, as the Board urges, that as a matter of policy, the national banking system should be divorced completely from concerns engaged in underwriting. But that question is not for the courts. Our function is merely to determine what Congress actually did in the statute before us. The Board could, and, if it so feels, should, present to the Congress its views on the problem of policy.

Collateral to the substantive question involved are the contentions of the Board that viewed as a suit against the Board, the action must fail because it is in effect a suit against the United States, which has not consented to be sued, and that the District Court is without jurisdiction to issue the writ of certiorari for the purposes sought.

The contention that the action for injunction is in effect a suit against the United States is without merit. Appellants seek to restrain an order of the Board on the ground that it is beyond the power of the Board. We need not pass upon the contention with respect to the jurisdiction of the court to issue a writ of certiorari, since we regard the action for injunction as the proper action.

Reversed.

Dissenting opinion

EDGERTON, J., dissenting:

I think the judgment should be affirmed. Eastman, Dillon & Co. are "Underwriters, Distributors, Dealers and Brokers in Industrial, Railroad, Public Utility and Municipal Securities." It seems to me a paradox to say that these underwriters are not primarily engaged in underwriting: are they, then, only incidentally engaged in underwriting? Everyone agrees that underwriting is one of the Eastman firm's primary business and brokerage another. I think it is equally true that they are "primarily engaged" in each, and not merely in both, of these businesses.

I think Congress used the word "primarily" in a sense which includes "essentially" or "fundamentally" and is not limited to

"chiefly" or "principally".[1] These are all recognized senses of the word. The Oxford Dictionary includes "essentially", Webster's New International Dictionary includes "fundamentally", and Funk & Wagnalls' Standard Dictionary includes both "essentially" and "fundamentally", among the meanings of "primarily".

The court argues that we should not impute obscure meanings of ordinary words to Congress. Highly obscure and even wholly unheard-of meanings of ordinary words have sometimes been imputed to Congress in order to avoid a result which Congress did not intend. Thus in Trinity Church v. United States[2] the
42 Supreme Court, in order to shield a church from criminal liability, held that a clergyman does not perform any "labor or service". But there is nothing obscure or unusual about a meaning which is recognized, without the slightest suggestion of rarity or obsolescence, by most of the leading dictionaries. Unusual meanings of ordinary words, when they are recognized at all by these dictionaries, are marked "rare".[3] Meanings which are recognized without qualification are ordinary meanings. By ruling that "primarily" has no ordinary meaning except chiefly or principally, this court overrules the editors of Webster's, the Standard, and the Oxford dictionaries on a question of fact in their field. I think the court errs in deciding that meanings which three leading dictionaries regard as ordinary are in fact so rare that they cannot have been intended by Congress. The contradiction is not reduced by the court's suggestion that the words "essentially" and "fundamentally" add nothing to the sense of the definitions in which they occur.[4] A dictionary is not a book of synonyms. It purports to give meanings of terms, not to furnish alternative terms by which a given meaning may be expressed. "Essentially" and "fundamentally" mean what they say.

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[1] Since the meaning which words convey necessarily varies with their context, interpretations of the words "primarily engaged" in other statutes are only slight evidence of their meaning here. For example, it is a far cry from the premise that the International Paper Co. is "only incidentally a holding company" and is "primarily engaged" in the paper business, within the meaning of the Public Utility Holding Company Act, to the conclusion that the Eastman firm of underwriters is only incidentally and not primarily engaged in the underwriting business within the meaning of the Act before us.

[2] 143 U. S. 457.

[3] The following quotations illustrate the way in which these dictionaries distinguish between ordinary and unusual meanings of ordinary words.

"Casual * * * 1. Happening or coming to pass without design, and without being foreseen or expected * * * 5. * * * Acting at random; undependable. Rare." Webster's New International Dictionary.

"Pleasant * * * 1. Giving or promoting pleasure * * * 2. Conducive to merriment or laughter; gay; lively; also (rarely), witty or facetious * * * 3. [Rare.] Excited with drink; alcoholically good-tempered." Funk & Wagnalls' New Standard Dictionary.

"Salt * * * 1. Impregnated with or containing salt; hence, having a taste like that of salt; saline * * * 5 Of speech, wit, etc.: Pungent, stinging. Now rare." Oxford Dictionary.

[4] The court's language is that essential and fundamental "are not synonymous of 'primary', and they overlap in meaning only when the implication of 'fundamental' or 'essential' is 'first' or 'principal'". This amounts to saying that "essential" and "fundamental" never "overlap in meaning" with "primary"; for the implication of "fundamental" or "essential" is never "first" or "principal". The two pairs of words convey wholly different ideas. The dictionaries include neither of the second pair in definitions of the first pair, and neither of the first pair in definitions of the second.

Choice between dictionary meaning is a normal process of statutory construction. It does not consist in deciding which meaning is the more usual. Its normal purpose and result are to give effect, as the Board did, to the probable intention of the legislature. This court's choice of a meaning for "primarily" is extraordinary in that its result is to defeat the intention of the legislature. It deprives § 32 of rational basis and of practical effect.

It is not disputed that what Congress aimed at in § 32 was the likelihood that if a bank director is interested, in the degree which Congress undertook to define as critical, in underwriting, the director may influence the bank or its customers to buy securities. This is made clear by the section itself.[5] In determining what interest in underwriting Congress undertook to define as critical, the question what interest might reasonably be thought criti-
43 cal is of great importance. Congress might reasonably think that if the director's employer is essentially engaged in underwriting, the director may be tempted to sell securities to the bank or its customers. Congress could not reasonably think that although the employer is so engaged, the fact that he is even more largely engaged in the related business of brokerage removes the temptation. The Board's interpretation attributes the rational theory, and this court's interpretation the irrational one, to Congress.

The Board says, and its statement is not disputed, that restricting the application of § 32 to firms whose underwriting business is first in volume would make this section "apply to no one". The court does not suggest that this result, which is no result at all, is the one which Congress intended. If the court's position is correct, the Act of Congress requires us to defeat the purpose of Congress. This seems to me another paradox.

The court argues that if Congress meant essentially it could have said essentially. It is equally true that if Congress meant principally it could have said principally. And the court overlooks the fact that in a different section of the same Act, and with regard to engaging in exactly the same group of activities, Congress did say principally. The "affiliate" section of the Act provides that a bank shall not, through control of stock or of directors, control an organization "engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities."[6] But § 32, which defines the degree of engagement in the underwriting business that disqualifies a man as a bank direc-

[5] The section authorizes the Board to make regulations which permit men within the described class to serve as directors of a bank "when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments."

[6] 48 Stat. 188 §20; 12 U. S. C. § 377.

tor, rejects the phrase "engaged principally" which had been used in the affiliate section and uses instead the phrase "primarily engaged." It is reasonable and conventional to suppose that Congress made this change with a purpose. If so, Congress did not intend that "primarily engaged" should be interpreted as meaning "principally engaged."[7]

From the fact that Congress made a "majority" of one sort critical in sections[8] of the Act where it used the word "majority," the court infers that Congress meant to make a majority of another sort critical in § 32 where it did not use the word. To me the opposite inference, if either, would seem to be suggested. But the contexts are so different that no inference is suggested. They are so different that the court's argument comes to this; by recognizing that majorities of votes control corporations, Congress implied that a man's qualifications to serve as a bank director should turn upon a majority of the business activity in which he is engaged. The sections on which the court relies concern affiliates of banks. The purpose of Congress, in those sections, was to prevent banks from controlling underwriting corporations. Since control of a corporation depends upon control of a majority of directors, or ownership or control of a majority of voting shares or of shares voted, Congress made such majority control the measure of prohibited affiliation. In respect to the control of a corporation, 51 per cent of directors or of voting stock is a wholly different matter from 49 per cent. But in § 32 Congress did not aim at control either of underwriters by banks or of banks by underwriters;[9] and even if Congress had aimed at control, the question whether underwriting was or was not a majority of a firm's business would still have been irrelevant to its purpose. Section 32 is aimed only at the likelihood that a bank director who is interested in the underwriting business may exert influence upon his bank or its customers in favor of that business. The likelihood that he will do this does not depend in any degree upon the question whether the underwriting business is 51 per cent or 49 per cent of the business in which he is interested. The fact that Congress expressly treated a majority of voting power as critical where it makes sense to do so has no tendency to show that Congress meant

[7] The opinion of the court points out that in § 21 of the Act, in prohibiting underwriters from being engaged in banking, Congress used the phrase "engage . . . to any extent whatever." As the court points out, this makes it quite clear that when Congress, in § 32, prohibited bank directors from being "primarily engaged" in underwriting, Congress did not mean "engaged to any extent whatever." But no one contends that Congress meant that.

[8] 48 Stat. 162, 188; §§ 2 (b) (14), 20; 12 U. S. C. §§ 221a (b) (1), 377.

[9] The section makes no distinction between one director, who has no control, and a majority of directors.

If underwriting were 100 percent of the business of a firm, that fact would give its employee no more control of a bank of which he was a director than he would have if underwriting were a trifling and non-essential part of the firm's business, but it would subject him to more temptation to exert his influence in favor of his employer's underwriting operations. Accordingly § 32 is, as all agree, so drawn that the employee is disqualified to serve as a bank director in the first case but not in the second.

to treat a majority of business activity as critical where it would not make sense to do so.

The Board interpreted "primarily" as meaning "essentially" or the like. This interpretation is in accordance with the Board's rulings in other cases [10] and carries with it, as settled administrative practice always does, a strong presumption of correctness. If Congress intended to forbid this interpretation the Board made a mistake of law.[11] But it seems to me clear that this is not the case. Accordingly I do not undertake to say whether the record would support a finding that the Eastman firm are principally engaged in underwriting.[12]

45 In United States Court of Appeals for the District of Columbia

No. 9102—January Term, 1946

JOHN AGNEW ET AL., APPELLANTS

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Before EDGERTON, WILBUR K. MILLER, and PRETTYMAN, JJ.

Judgment

Filed February 13, 1946

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District

[10] 27 Federal Reserve Bulletin 399 (1941).

[11] If Congress did not intend to forbid that interpretation, it is immaterial whether Congress intended to require it or only to permit it. "Congress may have intended the agency to determine the 'sub-principle' within the statutory framework. The vital factor is the intention of Congress, not the generality of the administrative application." Stern, Review of Findings of Administrators, Judges and Juries, 58 Harv. L. Rev. 70, 107.

[12] They put "Underwriters" first in their advertising, and they get all the underwriting business they can. This suggests primacy of interest and effort, which promote sales. For all that appears, they may get a larger net income from underwriting than from brokerage. A man may be principally engaged in the practice of law even if his transactions on the stock exchange are more numerous and more profitable, and employ more capital, than his legal transactions.

Court for further proceedings not inconsistent with the opinion of this Court.

Per. Mr. Justice PRETTYMAN.

Dated February 13, 1946.
Dissenting opinion by Mr. Justice EDGERTON.

In United States Court of Appeals for the District of Columbia

[Title omitted.]

Designation of record

Filed February 26, 1946

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United
46 States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Appendix to appellant's brief.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's certificate.

(S.) Edward M. Curran,
EDWARD M. CURRAN,
United States Attorney for the District of Columbia,
Court House, Washington, D. C.

(S.) George B. Vest,
GEORGE B. VEST,

(S.) J. Leonard Townsend,
J. LEONARD TOWNSEND,
Board of Governors of the Federal Reserve System,
Washington, D. C.,
Counsel for Appellees.

Personal service of the within Designation of Record acknowledged this 26th day of February 1946.

(S.) Hugh H. Obear,
HUGH H. OBEAR,
Southern Building, Washington, D. C.,
Counsel for Appellants.

[Clerk's certificate to foregoing transcript omitted in printing.]

47 Supreme Court of the United States

Order allowing certiorari

Filed April 29, 1946

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

~~[Endorsement on cover:] File No. 51008. Virginia, Supreme Court of Appeals. Term No. 1305. Helen C. Calvert, Petitioner, vs. Charles Henry Smith, Charles Henry Smith, Jr., Fanny J. Smith, Auburn Gardens, Inc., et al. Petition for writ of certiorari and exhibit thereto. Filed June 5, 1946. Term No. 1305 O. T. 1945.~~

U. S. GOVERNMENT PRINTING OFFICE: 1946